IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 787 of 1992
With
CIVIL APPLICATION No. 14233 of 2006
In
SPECIAL CIVIL APPLICATION No. 787 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NATIONAL BUILDERS - Petitioner(s)
Versus
STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :
MR SB VAKIL, Sr.Advocate with MR AS VAKIL for Petitioner
MR LR PUJARI, AGP for Respondent(s) : 1, 4,
NANAVATI ASSOCIATES for Respondent(s) : 2,
MR PR NANAVATI for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 15/01/2007

COMMON ORAL JUDGMENT

1. Present writ application has been filed by National Builders, a partnership firm, which is carrying on business of construction etc. The petition originally filed as on 20.11.91 prayed for the following reliefs:-

> *"[A] to command the Government of Gujarat to refund to the petitioners the amount of Rs.62,98,231/- recovered from the petitioners as royalty on minor minerals excavated and removed by the the petitioners from the land bearing survey nos. 4 and 5 of village Nani Khavadi District Jamnagar with interest at 21% per annum from the respective dates of recoveries of the amounts till payment.*
>
> *[B] to restrain pending the hearing and final disposal of this petition the Government of Gujarat, its officers and servants including the 4th respondent from demanding or recovering from the petitioners any amount of royalty on any minor mineral excavated and removed by the petitioners from the lands bearing survey nos. 4 and 5 of village Nani Khavadi, District Jamnagar or any amount of interest or any delayed payment on the royalty amount of Rs. 62,98,231/- or any part thereof or any other*

amount of royalty in respect of the said minor minerals."

2. From the prayers made in the original petition, it would clearly appear that the petitioner was seeking refund of Rs.62,98,231/- which was recovered by the State Government as royalty on minor minerals excavated by the petitioner from the land bearing surveys no. 4 and 5 of village Nani Khavadi, District-Jamnagar and to restrain the Government of Gujarat, its officers etc., from demanding or recovering from the petitioner any amount of royalty on any minor mineral.
3. I am required to refer to these prayers, because, during course of the hearing, the petitioner, through its learned counsel had filed an application, proposing certain amendments, whereunder now the petitioner submits that in view of the proposed amendment [Civil Application No. 14233 of 2006], the petitioner be granted reliefs against "the respondents".
4. Short facts necessary for proper disposal of the matter are that the petitioner, a registered

firm, carrying on business in partnership as Civil Engineers and Building Contractors, entered into an agreement with the respondent no.2 – Gujarat State Fertilizers Company Ltd., [“GSFC” for short] to construct 3.6 kilometer long approach bund or jetty for the Liquid Cargo Berth at Sikka near Jamnagar. It is to be noted that the respondent no.3 – Gujarat Maritime Board wanted to construct the above said approach bund or jetty and they had issued a contract in favour of the respondent no.2-GSFC, the said GSFC, in its turn, appointed the petitioner as their sub-contractor. On 9.1.86, GSFC wrote a letter to the petitioner firm accepting the offer of the petitioner for executing the work as GSFC's sub-contractor for sum of Rs.5,25,53,200/-.

5. Much before that, GSFC had made a proposal to Mamlatdar, Jamnagar, for allotment of certain land for developing a storage tank for their industrial use. It was to be a captive storage tank. The Mamlatdar, Jamnagar forwarded the proposal to the Collector. The Collector, in his

turn, vide his letter dated 9.4.86 [Annexure:2] informed the Mamlatdar, that possession of the land well described as surveys no. 4 and 5 of village Nani Khavadi, District-Jamnagar, be handed over to the GSFC. It is to be seen that in compliance of the order dated 9.4.86, possession of the land was given to the GSFC on 15.5.86, but much before the delivery of actual physical possession by the State to the GSFC or by GSFC to the present petitioner, excavation work started in January, 1986. Nobody knows that how such could happen, it really so happened that before possession could be handed over by the State Government to the GSFC, the GSFC exercised its power and authority over the said land and allowed the present petitioner to excavate the material. Not only this, the GSFC, for the reasons best known to it, wrote a letter dated 12.5.86 to the petitioner that they were to take maximum quantity of material from the above-referred land for construction of jetty. I will again record that possession was handed over to the GSFC on 15.5.86. Despite repeated

questions during course of the arguments to Shri Nanavati, learned counsel for the GSFC that how could the GSFC issue such directions or allow the present petitioner to excavate the land of surveys no. 4 and 5 of village Nani Khavadi, neither additional affidavit was filed nor Shri Nanavati was ready to divulge true facts. However, on 12.5.86, the GSFC informed the present petitioner that maximum use of the excavated material can be made.

6. On 10.4.87, vide Annexure:4, the GSFC issued a letter to the National Builders, the present petitioner, that they were pleased to award the work of digging pond near village Nani Khavadi on the terms as mentioned in the said letter dated 10th April, 1987. Condition No.2, however, provided that quarry fees, octroi duty, royalty or any other duty and/or levies, sales tax and any other taxes which were payable or would become payable at future date shall be borne by the National Builders [the petitioner] and the GSFC would have no obligation whatsoever. It is still a mystery that prior to 10.4.87, how

could the petitioner-National Builders start excavating the material from the land of surveys no. 4 and 5 of village Nani Khavadi. Neither the petitioner nor the respondent GSFC are ready and willing to unfold the mystery and remove the mist which has covered the entire dispute.

7. On 22.7.87, when the work of digging was in progress, Additional Director, Geology and Mining Department addressed a letter to the Gujarat Maritime Board, informing them that no royalty amount for the minerals used in jetty/bund was received by the State Government. It is to be seen that up to 22.7.87, the petitioner who was excavating and removing minor minerals in the process of digging a pond for construction of the storage tank did not pay any royalty etc. or price of the mineral to the State Government. On 1.9.87, vide Annexure:6, the GSFC wrote a letter to the petitioner suggesting the petitioner to make payment of the royalty etc. On 7.10.87, vide Annexure:7, respondent no.4, i.e. Director, Geology and Mining Department, informed the GSFC that the

royalty amount due was to the tune of Rs. 56,36,000/-. The petitioner, however, vide Annexure:9, dated 9.11.87 disputed their liability.

8. On 19.11.87, vide Annexure:10, an agreement was made between the GSFC and the present petitioner that GSFC, employer, was desirous that the work of construction of Liquid Cargo Berth at Sikka be carried out on the terms and conditions stipulated in the tender documents issued for the above work and the National Builders/Contractor shall carry out the work.

9. It would be surprising to note that the agreement was entered into on 19th November, 1987 and much before that the petitioner had collected material from the storage tank/pond area for construction of jetty/bund. The Court inquired from the learned counsel for the petitioner so also from the learned counsel for the GSFC that how could the work of jetty/bund be commenced without entering into a formal contract/agreement, appointing the petitioner as sub-contractor or contractor, the learned

counsel were not ready to reply. At this stage, it would be necessary to note that the agreement entered into between the Gujarat Maritime Board and the GSFC for construction of the jetty/bund was not produced, therefore, the Court asked the Gujarat Maritime Board and the GSFC to produce the said document. However, it has now come on the record that no formal agreement was ever executed or entered into between the Gujarat Maritime Board and the GSFC.

10. The Court also required the petitioner so also the GSFC to file a copy of the agreement which was entered into between the parties to show to the Court that on what terms the contract was given to the petitioner and whether the contract was inclusive of the price of the material to be supplied by the petitioner. Despite repeated adjournments, neither the petitioner filed the said agreement nor the GSFC was ready and willing to come out of its slumber. Reply from both the counsel was that the matter being old, they were tracing the document, but were unable to trace the same.

However, it was orally agreed that the contract given by the GSFC to the petitioner was inclusive of everything which would mean that the petitioner was to provide the material and cost of such material was to be paid by the GSFC to the petitioner.

11. When the Court asked the learned counsel for the petitioner and the GSFC that if the contract was inclusive of everything, then, why, free material was supplied and under what authority the GSFC could ask the petitioner to remove the material from the excavation site, learned counsel for the petitioner and the GSFC had no answer.

12. I am giving all these details to show that the petitioner and the GSFC had joined hands and were trying to take undue advantage of the situation which I shall discuss in detail in the later part of the judgment.

13. After receipt of letters from the Director, Geology and Mining Department and from the GSFC, the petitioner requested the GSFC that the amount demanded by the State Government be paid

to the government under protest so that the petitioner, may later on take appropriate steps. After receiving the instructions, the GSFC paid the said amount under Chalan to the State Government. Thereafter, the amount was calculated and some more recoveries were raised, the petitioner accordingly paid the said amount. After making such payments, the petitioner raised detailed dispute before the State Government and thereafter issued a notice/notice for demand under Section 80 for refund of the money which was recovered by the State Government towards the amount of royalty and thereafter has filed the present writ application.

14. The petitioner says and submits that the petitioner being not a lease holder or quarry owner or a prospecting licensee, liability of royalty could not be thrust upon it. Its submission is that if under the instructions of the GSFC, it had removed the excavated material, then liability would be that of the GSFC. It is also the submission of the petitioner that in

view of Rule-3 of the Gujarat Minor Mineral Rules, 1966 [“Rules of 1966” for short], nothing contained in the Rules shall apply to the extraction of minor minerals by Public Works Department etc. It is also the submission that Rule-21 of the Rules of 1966 provides for rate of royalty and dead rent and the same would not apply to the present case, because, the petitioner is not a quarry owner. It is also submitted that Rule-42 of the Rules of 1966 shall also not authorize the State Government and as such, the petitioner could not be held answerable to any coercive action. It was further submitted that Section-5 of the Mines and Minerals [Development and Regulation] Act, 1957 [“Act of 1957” for short] shall also not apply to the present petitioner, because, the petitioner is not quarry owner, lease owner, nor is having any prospecting license in his favour. It is further submitted that in view of Rules 67, 68, 69 and 70 of the Gujarat Land Revenue Rules, 1972, the petitioner could not be held liable to pay any royalty.

15.It was also submitted that the State Government was not entitled to recover any amount under the head of “royalty” nor GSFC could forward the amount to the State Government without registering protest for and on behalf of the petitioner.

16. It is to be noted that as no relief was claimed against the GSFC and the Gujarat Maritime Board, they did not prefer to file any counter affidavit. The State Government had filed its detailed affidavit, but when the Court required the State Government to inform the Court that why royalty only has been recovered from the petitioner and price of the mineral used has not been recovered, affidavit was filed saying that the State Government thought that recovery of the price may lead to delay the process, therefore, the State Government thought it prudent to recover royalty first, interest thereafter and any balance subsequent to it. This Court again required the State Government to give full details of what could be the price and what was the royalty. The Court required the

State to inform the Court that what is yet to be recovered.

17. The State had filed its third affidavit.

18. During course of the hearing, I have already observed that the petitioner made an application for amendment wherein it made various allegations against the GSFC. The GSFC has now filed counter affidavit and has submitted that all through, they had been asking the petitioner that it could collect the material, but it would be obliged to pay royalty etc. They also submitted that under bona fide belief they thought that the minerals excavated from the storage tank site belonged to it, therefore, they allowed the petitioner to use the said material. It was, however, submitted by them that the material, after excavation was lying scattered, therefore, the petitioner having its own transport machinery, was allowed to transport the material from the excavation site to the construction site. However, their case is that if under the law the petitioner was liable to pay royalty, then, the petitioner

would be obliged to pay the royalty.

19. In response to the petitioner's submission relating to Rule-67 to Rule-70 of the Gujarat Land Revenue Rules, 1972, the State has submitted that the said Rules would not be applicable, because, pond/storage tank for captive use would not be taken to be a well for public use. It is also submitted by them that the land was given to the GSFC for developing storage tank, but the order of allotment did not authorize the GSFC to use or utilize the material or authorize anybody to take material to any other site.

20. Gujarat Maritime Board, after the application for amendment was filed has also filed its affidavit and submitted that they have nothing to do with the dispute. During course of the arguments, Shri S.B.Vakil, learned Senior Advocate informed the Court that though amendment application seeks relief against “the respondents”, the petitioner does not press his writ application against the Gujarat Maritime Board. In view of the said statement made by

Shri Vakil, the petition against the Gujarat Maritime Board is dismissed.

21. It is not in dispute before me that the material excavated from the storage tank site falls within Section-3[e] of the Mines and Minerals [Development and Regulation] Act, 1957. The said definition provides that "minor minerals" means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral. Undisputedly, in view of the definition, the material excavated would fall within the definition of "minor minerals". The State Government, in view of Section 15 of the Act of 1957 is entitled to make rules in respect of minor minerals. Section-5 of the Act of 1957 provides for restrictions on the grant of prospecting licenses or mining leases. Section-5 to Section-13, in view of Section-14 of the Act of 1957 shall not apply to quarry leases, mining leases or other mineral

concessions in respect of minor minerals. The State Government, under Section-15 has framed Gujarat Minor Mineral Rules, 1966, which cover the entire area relating to minor minerals. It is to be seen that Rule-5 of the Rules of 1966 provides that subject to the provisions of rule 3, no person shall quarry, win, remove or carry away any minor mineral, except as provided under the Rules of 1966. Rule-3 of the Rules of 1966 provides that the Gujarat Minor Mineral Rules, 1966 shall not apply in certain cases. The petitioner has placed strong reliance upon Rule–3 to contend that as the Gujarat Maritime Board is a “State” in view of Article-12 of the Constitution of India, the GSFC being part of the State Government is also State and if the petitioner was to carry out contract work of construction of jetty/bund, then, Rule-3 would protect the petitioner. Rule-3 provides that it shall not apply to extraction of minor minerals by Public Works Department, various departments or any other departments of government, municipalities or panchayats subject to general

or special orders or instructions issued by Government from time to time. Though strong reliance has been placed by the petitioner upon sub-rule[1] of Rule-3, but unfortunately, nothing has been brought on record to show or suggest that the GSFC, an independent Corporation/Govt. Company would be treated to be a department of the government nor any special or general order issued by the government has been brought on the record to show or suggest that exemption has been granted from the application of Gujarat Minor Mineral Rules, 1966 in relation to the work of Gujarat Maritime Board or GSFC.

22. Sub-rule [2] of Rule-3 of the Rules of 1966 provides that the Rules shall not apply to extraction of minor minerals by any person for bona fide purposes in accordance with the provisions of rules 67, 68, 69 and 70 of the Bombay Land Revenue Rules, 1921 or any rules corresponding to such rules. Gujarat Government has provided for the corresponding Rules. The said Rules are Rules 67, 68, 69 and 70 of

Gujarat Land Revenue Rules, 1972. Rule-67 of the Rules of 1972 applies to case of removal of earth, stone, etc., by villagers for their own use without fee, but with the permission of the revenue patel. Present is not a case where villagers or village people had removed earth or stone etc., for their own use.

23. Rule-68 provides that with the previous permission of the Mamlatdar in writing for building, well etc., stone, kankar, sand, murum or other material may be removed by any person for purpose of building a well or for his domestic or agricultural purposes but not for sale or personal gain. Present again is not a case where material excavated from site/bund of the storage tank was removed for personal use or for construction of or building a well.

24. Rule-69 provides that in any case where excavation of the soil is likely to damage or destroy any valuable building or any land required for any special or public purpose or any boundary mark, the previous sanction of the Mamlatdar to any such removal shall be required.

Rule-69[1] does not provide for any exemption. Similarly, Rule-69[2] would also not apply to the present case. Rule-69[3] is in relation to trade or making bricks, tiles etc., by a potter. Present again is not a case of a potter who had removed earth or other material for construction of tiles, bricks etc.

25. Rule-70 on which strong emphasis had been laid by the learned counsel for the petitioner says that any person may, with the sanction of the revenue patel take free of all charge from village tanks as much earth, stone, kankar, sand, murum or other material as he requires provided that no stone shall be removed that may have fallen from the banks of built tanks, and that no excavation shall be made within 5 meters of the embankment of any such tank. It is submitted that the storage tank was for common village people and the petitioner, under the circumstances, was entitled to remove earth, stone etc. from the said bund/village tank. The GSFC nowhere says that the land allotted to them was for public purpose even when the State

Government has come out with its straight case that the land was given to the GSFC for their captive use for construction of storage tank for industrial purposes. If that be so, the tank cannot be taken to be a village tank and Rule-70 would not apply.

26. Sub-rule [3] of Rule 3 of Rules of 1966 provides that the rules would not apply to the storage for wining of minor minerals on the surface by chipping of outcrops by a geologist's hammer without involving any disturbance of the soil by digging of pits, trenches or otherwise. Present is not a case which could fall under Rule-3[3]. It is further submitted that sub-rule[4] of Rule-3 may cover the case, because, the Rules would not apply to digging of wells for water and foundation for buildings and disposal of the minor mineral extracted thereof. It is submitted with vehemence that tank/pond would stand on equal footing to a well, because, both provide source of water and both are artificial source of providing water. It is submitted that if the tank is taken to be a

pond , then, the petitioner, who was digging a pond would be entitled to dispose of the minor minerals extracted from the said pond. I am surprised to hear this argument. Even a villager knows difference between the tank/pond and a well. A pond is a place where water collects either through natural rain flow or by collection. A pond/storage tank may have a kachcha bed or may have a pakka bed for storage of water, but a well is the natural source of water though well in itself is not a natural construction. In the well, water percolates from the natural stream running underground and then, the same provides water. A well is smaller in area, while the pond or storage tank does have a very large expanse and in no way can be compared with well. In the opinion of this Court, digging of the well cannot be compared with pond/construction of storage tank and under such circumstances, sub-rule-[4] of Rule-3 would also not apply.

27. Sub-rule[5] of Rule-3 would also not apply to the case, because, present is not a case of

removal of minerals from the agricultural field for betterment of the agricultural land by the occupant himself.

28. In view of the aforesaid discussion, Rule-3 of Rules of 1966 would not provide any protection or solace to the petitioner. Once Rule-3 does not apply, Rule-5 would apply with its full force and would make it clear that no person shall quarry, win, remove or carry away any minor mineral except as provided under the Rules of 1966.

29. It is also to be seen that Rule-27 of the Rules of 1966 provides that quarry lease cannot be granted by a party to anyone else, because, the same shall be subject to the restriction prescribed in Rules-6, 15, 16 and 18. It would also be seen that Rule-44 of the Rules of 1966 provides that notwithstanding anything contained in Rule-1 to Rule-43, it shall be lawful for a competent officer to sell by public auction or otherwise dispose of the right to remove any minor mineral or of collection of royalty thereon in such cases or class of cases and on

such terms and conditions as the State Government may, by a general or special order direct. The Supreme Court, in the matters of ***Banarasi Dass Chadha and Bros., v. Lt. Governor, Delhi Admn. And others [AIR 1978 SC 1587]*** has clearly observed that the scattered material lying on the surface of the earth would also come within the mischief of minor mineral. If such material is to be taken as minor mineral for purposes of Act of 1957 and Rules of 1966, the petitioner otherwise was not entitled to remove the said material and excavated material could only be disposed of by a competent officer under Rule-44 of the Rules of 1966. Rule 44-C further provides that the State Government shall without prejudice to the provisions contained in the rules, charge simple interest at the rate of twenty-four per cent, per annum on any rent, royalty or other sum due to the State Government under the rules or under the terms and conditions of any quarry lease or quarrying parwana from the date fixed by the Government or the competent officer or, as the case may be,

the Director for payment of such royalty, rent or other sum and until payment of such royalty, rent or other sum is made. A fair reading and understanding of Rule-44 would make it very clear that the State would be entitled to recover the royalty, rent or other sum and so long as the said amount is not paid, the State would be entitled to charge interest at the rate of twenty-four per cent per annum from the date fixed by the government. A fair reading of Rule 44-C would also make it clear that the State Government has reserved unto itself an authority and a right to recover royalty etc. or interest thereon. Under the circumstances, it cannot be said that the State Government would not be entitled to recover royalty or rent. If Rule-5 applies with its full force and no person is entitled to quarry, win, remove or carry away any minor mineral, then, the State would be entitled to recover royalty, rent or other sum under Rule 44-C with interest. What shall be the rate of the royalty or dead rent is to be provided under Rule-21. Schedule appended to the

Rules clearly provides for the rates etc.

30. Mines and Minerals [Development and Regulation] Act, 1957 provides that Section-5 to Section 13 only would not apply in respect of minor minerals. It does not say that Section-21 which provides for penalties would also not apply to a case of minor minerals. Section-21 of the Act of 1957 provides that whoever contravenes the provisions of sub-section [1], or sub-section [1A] of section 4 shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twenty-five thousand rupees, or with both. Section-4 provides that prospecting or mining operations must be under license or lease. In the present matter, the land was allotted to GSFC for construction of a storage tank. It is not the case of the GSFC that the State Government ever authorized it to dispose of the excavated material. If the said excavated material could not be used or utilized by the GSFC nor could the same be disposed of by them, then at the first instance, they could not allow the present

petitioner to use or utilize the material. It appears that after realizing their mistake, they started observing that removal of such material shall be subject to payment of royalty etc. It is not the case of the petitioner that it ever raised any objection against imposition of such terms or conditions. It is to be seen from the Annexure:4 – letter dated 10.4.87 that GSFC had asked the present petitioner that the petitioner may excavate the pond at their own risk and cost and in turn, they shall be allowed to take out excavated materials, i.e., earth, murrum, soil, boulders, rubbles etc. free of cost for using it elsewhere. They had, however, in their letter informed the petitioner that quarry fee, royalty or octroi duty or any other duty and/or levies, sales tax and other taxes which were payable or become payable at future date, shall be borne by the petitioner. This letter was accepted by the petitioner without any reservation, remorse or protest. At least from the letter dated 10.4.87, it was clear that the GSFC was allowing the petitioner to remove the goods, but also

informed the petitioner that it shall be answerable to royalty etc. as levied or found leviable.

31. From the agreement, dated 19.11.87, Annexure:10, it would clearly appear that jetty cum bund was to be constructed, completed and maintained by the petitioner in all respects under the provisions of the contract. Clause-4 provided that the GSFC was to pay to the contractor, contract price in consideration of the construction, completion and maintenance of the work at the time and in the manner prescribed by the contract. Clause-vii of Appendix-B to Annexure:10 provided that the contractor shall be responsible for locating sources for all bund materials, aggregates, etc. and their rates should not be qualified by the limitations on the lead distance and other variables. It further provided that the GSFC would assist by way of recommendation letters to the authorities for leasing of quarries, etc. but cannot guarantee waiver of payment of royalties and other charges. From Clause-vii,

it would be clear that contractor was to locate sources from the bund material, that is, minor minerals and material to be used for construction of the bund. The GSFC had only assured that it would make recommendations to the authorities for leasing of quarries, but it was made clear that it did not guarantee waiver of payment of royalty or other charges.

32. It is the case of the State that on recommendations made by the GSFC and on an application by the petitioner, two areas were allocated in favour of the petitioner, however, the petitioner, despite taking possession of the said areas did not operate the said area, but used the material which it had excavated from the site of storage tank.

33. From the agreement, it would clearly appear that the total material for construction of bund was to be provided by the petitioner and if such material was to be provided by him, then, either as person who was using material or as a person who was removing the material/minor minerals, it was answerable to make payment of the royalty.

The petitioner cannot be allowed to say that present was a government work, therefore, it would not be answerable to make payment of the royalty. The petitioner also cannot be allowed to say that because the GSFC allowed it to remove excavated material and the petitioner not being a lease-holder or quarry owner, it would not be answerable to pay royalty. In fact, the material which was excavated was property of the government, because, the government never allowed the GSFC to use and utilize the said excavated material and if that be so, the GSFC which had no ownership rights over the property was not entitled to allow the petitioner to remove the material. If GSFC had allowed the petitioner to remove the material subject to payment of royalty etc. and the petitioner did not raise any objection to it, then, the petitioner cannot be allowed to say that the liability of payment of royalty etc., would be that of the GSFC.

34. It would now be necessary to revert back to Section-21 of the Act of 1957, sub-section [5]

of which provides that whenever any person raises, without any lawful authority, any mineral from any land, the State Government may recover from such person the mineral so raised, or, where such mineral has already been disposed of, the price thereof, and may also recover from such person, rent, royalty or tax, as the case may be, for the period during which the land was occupied by such person without any lawful authority. Sub-section [5] of Section 21 of the Act of 1957 does not talk of any quarry owner or lease holder or a person holding prospecting license, but it refers to every and any person. If the petitioner falls within the purview of “any person”, then sub-section [5] of Section-21 of the Act of 1957 would apply with full force. Under such situation, the State would be entitled to recover the minerals from the petitioner and in case, the same has been used or utilized or disposed of by the petitioner, then the State would be entitled to recover the price of such mineral and would also be entitled to recover rent or royalty or tax as the case

may be for the period during which land was occupied by such person without any lawful authority.

35. At this stage, I must also observe that on one side the GSFC was entering into an agreement with the petitioner, whereunder, they had agreed to pay cost of the material, but at the same time, they allowed the petitioner to lift the material free of cost. It was nothing but a simple bad action on the part of the GSFC. The GSFC, it is expected, is run by authorized and prudent persons and is not an organization/corporation created by the State Government to help and assist such people who are entering into nefarious activities. The manner in which the GSFC issued instructions in favour of the present petitioner to excavate the material and use the same was absolutely unfair. On one side, they had not obtained possession of the land and before even obtaining possession, they allowed the petitioner to start excavating operations and allowed the petitioner to use the material even before entering into formal

contract of construction of Bund. This Court is unable to understand that why officers of GSFC acted in such nasty manner less realizing that they were occupying office of the GSFC for saving public money as a responsible person.

36. During course of the arguments, certain questions regarding maintainability of the petition under Article 226 of the Constitution were raised from the side of the State Government, but in view of the admission of the writ petition and judgment of the Apex Court that it would be a question of self-restraint by the High Court, I do not enter into the said controversy. During course of the arguments, catena of the authorities were cited to satisfy the Court that in case of illegal recovery of tax, rent or royalty by the government, a writ petition would be maintainable. I had already entered into factual disputes, therefore, the said question has also become academic.

37. In support of the amendment application, it was submitted that the petitioner was trying to seek further and better relief, therefore, amendment

ought to have been allowed. In the opinion of this Court, amendment would not make much difference so far as the State Government is concerned, because, the petitioner has already sought relief against the State Government, but amendment cannot be allowed against the GSFC, because, the petitioner has already lost limitation of filing a suit for recovery of the money. True it is that in a given case, High Court, irrespective of the question of limitation may issue writ in favour of the petitioner against the State Government for refund of the tax illegally recovered, but in the present case, the GSFC had not recovered anything illegally, but had simply forwarded the money under the directions of the petitioner. Though it was sought to be argued that the petitioner would be entitled to recover money from the GSFC, because, it had not deposited money with the State Government under protest as directed by the petitioner and under the circumstances, the GSFC being garnishee would be answerable to the claim of the

petitioner. In the present case, I am not ready and inclined to grant amendment against the interest of the GSFC, because, the petitioner did not choose to file a suit against the GSFC as garnishee. Accordingly, Civil Application No. 14233 of 2006 is rejected.

38. It is also to be seen in the present case that the petitioner had entered into an agreement of construction of bund cum jetty for the amount to be paid by the GSFC which was inclusive of the cost etc. and the material was to be procured by the petitioner. If the petitioner was to procure the material from anywhere else, then he was obliged and required to pay royalty. He was also required to pay some price of the material. In the present case, as the burden of the price and royalty has already been passed by the petitioner, under the agreement to the GSFC, the petition cannot be allowed, because, the same would amount to unjust enrichment. In the matter of ***Dhanyalakshmi Rice Mills etc. v. The Commissioner of Civil Supplies and another [AIR 1976 SC 2243] and in the matter of Sate of***

Madhya Pradesh v. Vyankatlal and another [AIR 1985 SC 901], the Supreme Court has clearly observed that if the burden of the incidence/tax has already been passed by the petitioner, then it would not be entitled to an order in its favour.

39. No other point was raised by the learned counsel for the petitioner.

40. Taking into consideration the totality of the circumstances and conduct of the petitioner in not producing the material documents, and legal position as discussed above, I am of the considered opinion that the petitioner is not entitled to any relief. The petition deserves to and is accordingly dismissed with costs of Rs. 25,000/- [Rupees Twenty Five Thousand] to be paid by the petitioner to the State Government and Rs. 25,000/- [Rupees Twenty Five Thousand] to be paid to the Gujarat Maritime Board which has been unnecessarily joined as party respondent. I shall not allow any cost in favour of the GSFC, because, their conduct is not fair to the Court. The State Government is hereby

directed to take appropriate action against officers of GSFC who, while occupying office in the GSFC had allowed the petitioner to remove the material free of cost.

41. The petition is dismissed. Rule is discharged. Interim relief, if any, is vacated.

[R.S. GARG, J.]

pirzada/-